

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOSEPH ARNOLD</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>GOODYEAR TIRE &amp; RUBBER CO.</b>	)	
Respondent	)	Docket No. 265,775
	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the May 3, 2004 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 12, 2004.

**APPEARANCES**

Gary Peterson, of Topeka, Kansas, appeared for the claimant. John A. Bausch, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ concluded claimant sustained a 5 percent functional impairment to the body as a whole as a result of his August 31, 2000 accident. He further awarded claimant a 60.84 percent work disability based upon a 66 percent wage loss and a 55.67 percent task loss.

The respondent alleges the ALJ's award should be reversed. While respondent takes no issue with the ALJ's functional impairment and work disability findings, respondent nonetheless contends whatever permanent impairment and resulting work disability claimant has is causally unrelated to the August 31, 2000 accident. Because all of the treatment for this condition is due to a non-compensable intervening event(s), respondent further argues that it is entitled to reimbursement from the Kansas Workers Compensation Fund (Fund) for all the monies it has erroneously paid on claimant's behalf. Alternatively,

respondent maintains that if the Award is affirmed, the Board must correct the ALJ's calculations to eliminate an improper duplication of benefits.

The claimant argues the ALJ's Award should be affirmed in all but one respect. Claimant concedes the ALJ's disability compensation calculations are erroneous, but believes its suggested calculation is the appropriate method rather than that advanced by respondent.

The issues to be decided are as follows:

1. Whether claimant's ongoing back complaints are causally related to his August 31, 2000 work-related injury, or to one or more of the three intervening and non-work related events that occurred since his August 31, 2000 accident.
2. If claimant's ongoing back complaints are causally related to the August 31, 2000 accident, what is the nature and extent of claimant's permanent impairment?
3. If claimant's permanency is attributable to his accident, did the ALJ correctly calculate the amount currently due and owing to claimant?
4. If claimant's permanency is not attributable to his August 31, 2000 accident, is respondent entitled to reimbursement from the Kansas Workers Compensation Fund pursuant to K.S.A. 44-566a?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable accident on August 31, 2000 when he injured his low back while removing a tire from a drum. While claimant continued to work he would periodically see the company doctor for his low back complaints. The respondent's in-house medical records reflect these periodic visits. According to claimant, he would be placed on light duty for a week or 10 days then he would be returned to his regular job. On April 20, 2001, claimant reported to the company physician that his ongoing back pain was gradually worsening. The MRI, which was performed on March 26, 2001, revealed mild degenerative bulging at L3-4 and L4-5.

On June 18, 2001, July 7, 2001 and July 17, 2001, claimant sought treatment from an emergency room each time complaining of an acute increase in his low back pain. The records from the first visit indicates claimant reported an increase of low back pain

occurring while working on his truck.<sup>1</sup> The second visit on July 7, 2001, indicates that claimant had been getting “along fine with that but he reinjured it [his back] on Sunday” when he was lifting a laundry basket.<sup>2</sup> Then on July 17, 2001, claimant was at home and felt a sharp pain in his low back when he bent over.

According to claimant, these ER visits do not represent new injuries. Rather, he had temporary spikes in his pain which warranted immediate treatment.

On September 6, 2001, the plant where claimant worked was shut down. Claimant testified that his low back pain never went away since the accident, and that he began to experience pain in his legs as well. Claimant eventually requested further treatment from respondent. Following a preliminary hearing, claimant was granted treatment with Dr. Glenn Amundson. He was also granted temporary total disability benefits commencing September 7, 2001.

Dr. Amundson ordered a MRI and a discogram. These tests revealed a diffuse bulging disc, and mild facet hypertrophy resulting in mild spinal stenosis at L3-4. At L4-5 there was what appeared to be a posterior high intensity zone and slightly eccentric to the left bulging disc and central disc. Dr. Amundson offered claimant the option of an intradiscal electrothermal annuloplasty (IDET) at the L3-4 and L4-5.<sup>3</sup> This procedure was done on December 27, 2001. Following his recovery, the discogram was repeated on October 1, 2002. Although the tests indicated the disc pathology had been addressed, claimant continued to have low back pain.

Thereafter, Dr. Amundson diagnosed facet syndrome.<sup>4</sup> Claimant was referred for facet injections and fortunately, they proved somewhat helpful. Dr. Amundson then suggested a procedure to permanently ablate the nerves. On April 13, 2003, claimant was declared to be at maximum medical improvement.<sup>5</sup> Dr. Amundson assessed a 5 percent permanent functional impairment, based upon DRE Category II of the AMA *Guides*<sup>6</sup>, which he causally related to claimant’s original work-related August 31, 2000 accident.<sup>7</sup> He also

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<sup>1</sup> Delgado Depo., Resp. Ex. E.

<sup>2</sup> *Id.*, Resp. Ex. F.

<sup>3</sup> Amundson Depo. at 5, Ex. 2 at 20-21.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 6-7.

<sup>6</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>7</sup> Amundson Depo. at 8-9, Ex. 2 at 1.

imposed restrictions limiting claimant's activities to occasional lifting to 20 pounds, avoiding any sustained or awkward postures, avoiding provocative maneuvers and postures such as bending, pushing, pulling, twisting, or lifting activities on other than an occasional basis.<sup>8</sup>

When asked to consider whether the intervening events which led claimant to seek emergency treatment in June and July of 2001 could have made his disc condition symptomatic, Dr. Amundson indicated he considered those events "in the category of exacerbations of the pain syndrome that was initiated by his on-the-job injury."<sup>9</sup> He later went on to explain that the "on-the-job injury that seemed to have initiated his pain syndrome or the original complaints"<sup>10</sup> and the ER visits represent flare ups or exacerbations of the condition.

Dr. Amundson later discharged claimant from his care explaining that he believed claimant was taking too much medication and was repeatedly asking for medication refills. Claimant disputes this contention asserting that the physician's staff was not providing the prescriptions as they represented.

At his counsel's request, claimant was evaluated by Dr. Sergio Delgado, an orthopaedic surgeon, on June 25, 2003. Dr. Delgado reviewed claimant's medical records, including the records from the ER and the occupational health facility which indicate claimant's back complaints increased over time and up to June and July of 2001. He opined that the ER visits did not represent a new injury or injuries because claimant consistently related his back pain to his August 2000 accident. Dr. Delgado diagnosed chronic lumbosacral persistent complaints superimposed on degenerative changes.<sup>11</sup> He rated claimant at DRE Category II which equates to a 5 percent impairment and issued restrictions consistent with those imposed by Dr. Amundson.<sup>12</sup>

Respondent then referred claimant to Dr. Phillip L. Baker, an orthopaedic physician, for an evaluation in July 2002. Dr. Baker diagnosed multilevel degenerative disc disease of the lumbar spine and like the other physicians, Dr. Baker assessed claimant's functional impairment at 5 percent based upon DRE category II as a result of the August 31, 2000 accident. Dr. Baker was also shown the ER reports from June and July 2001 relating to claimant's back complaints. He reviewed them in advance of his deposition and testified

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<sup>8</sup> *Id.* at 9, Ex. 2 at 2.

<sup>9</sup> *Id.* at 37.

<sup>10</sup> *Id.* at 38.

<sup>11</sup> Delgado Depo. at 13.

<sup>12</sup> *Id.* at 14.

that any of the events described in those reports *could* continue the condition or cause the condition for which claimant was being treated.<sup>13</sup>

The ALJ considered this evidence and concluded claimant sustained a 5 percent permanent partial functional impairment to the whole body as a result of the August 31, 2000 accident. Because claimant had not returned to work, the ALJ awarded claimant a 60.84 percent work disability.<sup>14</sup> Although there is no express conclusion within the Award, it is clear based upon the ultimate findings that the ALJ was persuaded that the intervening events that compelled claimant to go to the ER in June and July 2001 were not intervening accidents, and that his permanency was related to the underlying work-related accident.

The Board has considered respondent's contention that claimant's functional impairment and work disability were unrelated to his work-related injury but affirms the ALJ's contrary conclusion. Claimant's low back complaints did not markedly improve following his accident. Respondent's dispensary notes indicate claimant sought treatment at least once in September 2000 and numerous times in March and even on into April 2001. The MRI that was performed on March 26, 2001 revealed mild degenerative disk bulging at L3-4 and L4-5. At least based upon the medical records produced by the parties claimant went without any further treatment until June and July 2001 when he had flare ups while performing activities at home. He then returned to work and full duty until the plant shut down. That prompted him to seek further treatment with Dr. Amundson.

Dr. Amundson had a second MRI performed and it too revealed the bulging discs at the same levels previously identified. Clearly claimant's symptoms were continuing and he was not improving. While Dr. Baker testified that any one of the three intervening events which led claimant to seek emergency treatment *could* have caused his low back complaints, the testimony of both Dr. Amundson and Dr. Delgado support claimant's theory that his complaints date back to August 31, 2000. Therefore, the ALJ's finding on the issue of causation is affirmed.

As for the parties contention that the ALJ's Award is computed erroneously, the Board agrees. The correct computations are provided below. The parties will note the calculation awards claimant the full 20.75 weeks which represents the 5% functional impairment claimant sustained before he was taken off work and granted temporary total disability benefits for the 84 week period. At that point, claimant is awarded a work disability. Pursuant to statute, K.S.A. 44-510e, those weeks of temporary total disability benefits which exceed 15 weeks have been deducted from the 415 weeks available as have the 20.75 weeks previously awarded for the functional impairment.

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<sup>13</sup> Baker Depo. at 17.

<sup>14</sup> At oral argument, the parties agreed that the ALJ's findings with respect to functional impairment and work disability were not in dispute. Rather, it is the causation that is in dispute.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 3, 2004, is affirmed. The Board, however, must correct the calculation to reflect the appropriate amount presently due and owing.

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$401 per week or \$8,320.75 for a 5% functional disability followed by 84 weeks of temporary total disability compensation at the rate of \$401 per week or \$33,684 compensation at the rate of \$401 per week, plus permanent partial disability compensation at the rate of \$401 per week for an award not to exceed \$100,000 for a 60.84% work disability.

As of October 29, 2004 there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of \$401 per week, or \$8,320.75 plus 84 weeks of temporary total disability compensation at the rate of \$401 per week in the sum of \$33,684 plus 80.71 weeks of permanent partial disability compensation at the rate of \$401 per week in the sum of \$32,364.71 for a total due and owing of \$74,369.46, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$25,630.54 shall be paid at the rate of \$401 per week until fully paid or until further order from the Director.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary Peterson, Attorney for Claimant  
John A. Bausch, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director